

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Petition of USTelecom for Forbearance
Pursuant to 47 U.S.C. § 160(c) to Accelerate
Investment in Broadband and Next-
Generation Networks

WC Docket No. 18-141

**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In accordance with the Order released by the Federal Communications Commission (FCC or Commission) on June 1, 2018, granting a 60-day and a 15-day extension of time for the submission of comments and reply comments, respectively, in this proceeding, the Pennsylvania Public Utility Commission (Pa. PUC) files these comments in opposition to the May 4, 2018 United States Telecom Association (USTelecom) Forbearance Petition (“Petition”) requesting, among other things, forbearance from the ILEC-specific unbundling and resale mandates in Section 251(c)(3) and (4) and associated Section 251 and 252 obligations under the federal Telecommunications Act of 1996 (TA-96).¹ Pursuant to the June 1, 2018 Order, comments are due on or before August 6, 2018, and reply comments are due on or before September 5, 2018.

As an initial matter, these comments should not be construed as binding on the Pa. PUC in any matter before the Pa. PUC. Moreover, the Pa. PUC’s position set forth

¹ The Petition also requests forbearance from the Regional Bell Operating Company or RBOC-specific time interval requirements for nondiscriminatory treatment of affiliates and non-affiliates regarding requests for service in Section 272(e)(1) and the long distance separate affiliate requirement for independent ILECs set out in Section 64.1903 and RBOC-specific competitive checklist item regarding access to poles, ducts, conduit and rights-of-way in Section 271(c)(2)(B)(iii).

in these comments could change in response to later events, including Ex Parte filings, legal proceedings or other regulatory developments at the state or federal level. Lastly, the instant comments build upon prior filings of the Pa. PUC on several issues concerning forbearance.

I. Introduction and Summary

On May 4, 2018, USTelecom filed its Petition seeking forbearance from various statutory obligations designed to create a pro-competitive telecommunications marketplace pursuant to Section 10 of the Communications Act as amended (Act). USTelecom avers that the obligations are no longer necessary and distort competition and investment decisions. Specifically, in its Petition, USTelecom asks the Commission to forbear from applying the following obligations:

- ILEC-specific unbundling and resale mandates in Section 251(c)(3) and (4) and associated Section 251 and 252 obligations;
- RBOC-specific time interval requirements for nondiscriminatory treatment of affiliates and non-affiliates regarding requests for service in Section 272(e)(1), and the long-distance separate affiliate requirement for independent ILECs set out in Section 64.1903 of the Commission's rules; and
- RBOC-specific competitive checklist items regarding access to poles, ducts, conduit, and rights-of-way in Section 271(c)(2)(B)(iii).

USTelecom asserts that the Section 10 of the Act, 47 U.S.C. § 160, forbearance criteria are met with respect to each of these regulatory obligations. To meet the Section 10 forbearance criteria, the Commission must make affirmative determinations that: (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; and (3) forbearance from

applying the provision or regulation is consistent with the public interest. 47 U.S.C. § 160(a).

The Pa. PUC opposes USTelecom's Petition for several reasons. First, the Commission should not depart from the statutory impairment standard in determining whether to modify the application of the unbundling framework to the Incumbent Local Exchange Carriers' (ILECs) network. Second, there is insufficient granularity in the data submitted by the Petitioners to justify its forbearance request regarding the ILEC-specific unbundling and resale statutory mandates. Third, the FCC's proceeding should be conducted on-the-record with all parties subject to examination along with the submission of briefs and reply briefs. Fourth, the Pa. PUC is concerned about the adverse impact that any FCC decision will have on competition in Pennsylvania.

Given these considerations, USTelecom has failed to make a *prima facie* showing that forbearance from the statutory and regulatory obligations is warranted under each prong of the statutory standard as required by Section 1.54(b) of the Commission's rules. Therefore, USTelecom has failed to satisfy its burden, and its Petition must be denied.

II. The Commission Should not Forbear From Enforcement of the Unbundled Access and Resale Provisions in Section 251(c)(3) and (4) of the Telecommunications Act of 1996 and Associated Requirements Under Sections 251 and 252 Without a More Granular Showing That Satisfies the Statutory Impairment Standard.

A. The Commission Should Not Abandon Use of the Impairment Standard Under Section 251(d)(2) of TA-96 to Eliminate or Modify the Unbundling Obligations of Section 251(c)(3).

USTelecom is attempting to use forbearance to support its request for expansive relief from the statutory unbundling obligations. Relief from these obligations, however, should be done only after the Commission conducts an impairment analysis under Section

251(d)(2) of TA-96 and not through forbearance. The Commission should not depart from its precedent that used the statutory impairment standard in determining whether it should modify the application of the unbundling framework to the ILECs' network elements and use forbearance as an alternative to eliminating the unbundling obligations of Section 251(c)(3) of TA-96.

In enacting the TA-96, Congress tasked the Commission with fulfilling its pro-competitive goal of opening the local exchange and exchange access markets to competition. Among other things, the statute imposes requirements on ILECs to provide access to network elements on an unbundled basis under Section 251(c)(3) of the TA-96. 47 U.S.C. § 251(c)(3). In particular, Section 251(c)(3) requires ILECs to provide requesting telecommunications carriers with “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252.” In addition, Section 251(d)(2) authorizes the Commission to determine which elements are subject to unbundling and directs the Commission to consider, “at a minimum,” whether access to proprietary network elements is “necessary” and whether failure to provide a non-proprietary element on an unbundled basis would “impair” a requesting carrier’s ability to provide service.

These two statutory provisions work in concert. Regarding the implementation and application of the unbundling framework going forward, Congress created the above statutory scheme for the Commission to follow when determining whether it should modify, limit, or eliminate unbundling requirements. Access to unbundled network elements (UNEs) would be allowed only after a finding in a targeted manner that the failure to provide access to such network elements under Section 251(c)(3) would *impair* the ability of the competitive telecommunications carrier seeking access to provide the services that it seeks to offer pursuant to standards set out in Section 251(d)(2).

The Commission historically has used the impairment standard when determining whether it should modify, limit, or eliminate unbundling requirements. For example, in the *Triennial Review Order*,² the Commission addressed marketplace realities of robust broadband competition and increasing competition from intermodal sources and eliminated most of the unbundling requirements for broadband architectures serving the mass market. The *Triennial Review Order* had the effect of limiting unbundled access to next-generation loops serving the mass market, based on a finding that requesting carriers were not impaired without access to fiber loops.³

Additionally, the Commission in the *TRRO* again used an impairment analysis to limit the scope of its Section 251 unbundling authority so it would not frustrate sustainable, facilities-based competition in certain telecommunications markets.⁴ In the *TRRO*, the Commission took additional steps to encourage the innovation and investment that come from facilities-based competition by using its Section 251 unbundling authority in a more targeted manner.⁵ The *TRRO* imposed unbundling obligations only in those situations where the Commission found that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition. The Commission determined that this approach satisfied the guidance of the appellate courts to weigh the costs of unbundling and ensured that the unbundling rules provided the right incentives for both ILECs and competitive local

² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003) (*Triennial Review Order Errata*), vacated and remanded in part on other grounds, affirmed in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) cert. denied, 125 S.Ct. 313, 316, 345 (2004).

³ The FCC did acknowledge that this finding did vary to some degree depending on whether the loop is a new loop or a replacement loop.

⁴ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 (2005) (“*TRRO*”).

⁵ In the *TRRO*, the Commission put into place new rules applicable to ILECs’ unbundling obligations with regard to mass market local circuit switching, high-capacity loops, and dedicated interoffice transport.

exchange carriers (CLECs) to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition.

The Pa. PUC notes that in both the *Triennial Review Order* and the *TRRO*, the Commission required a level of granularity with the evidence to meet the impairment standard. With the *Triennial Review Order* for example, the Commission specifically noted that actual marketplace evidence was the “most persuasive and useful kind of evidence,” while also noting that it was “most interested” in “granular evidence.”⁶ Specifically, the Commission in the *Triennial Review Order* applied several types of granularity in its unbundling analysis, including considerations of customer class, geography, and service.

The Commission should not depart from the statutory impairment standard in determining whether to modify the application of the unbundling framework to the ILECs’ network. Just as the Commission did previously in the *Triennial Review Order* and *TRRO* proceedings in determining whether it should modify its application of the unbundling framework, USTelecom should comply with the statutory scheme and be required to undergo a Section 251(d)(2) impairment test to determine if it is appropriate again for the Commission to impose Section 251(c)(3) unbundling obligations in a more targeted manner for ILECs. The Commission through the impairment standard can eliminate or modify unbundling requirements but without the preemptive effect that forbearance may trigger, which is another benefit with such an approach.

⁶ *Triennial Review Order* at para. 93.

B. The Commission Should Not Grant Forbearance from the Unbundling and Resale Obligations of Section 251(c)(3) and (4) of the Telecommunications Act of 1996 Because USTelecom Has Not Provided Sufficiently Granular Data to Meet the Relevant Statutory Criteria.

The unbundling obligation of Section 251(c)(3) permits new entrants, where economically efficient, to substitute ILEC facilities for some or all of the facilities the new entrant competitor would have required to compete. In particular, Section 251(c)(3) requires ILECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point and on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Additionally, TA-96 requires all ILECs to offer for resale any telecommunications service that the carrier provides at retail to their respective subscribers who are not telecommunications carriers. Section 251(c)(4) requires that ILECs offer "for resale at wholesale *rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," without unreasonable conditions or limitations. 47 U.S.C. § 251(c)(4)(emphasis added). Pursuant to this statutory provision, ILECs are still required to make certain network elements available via wholesale at regulated prices.

USTelecom seeks forbearance from these two statutory obligations. Section 10(a) of the Act, provides that the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some geographic markets, but may not grant forbearance from any provision of TA-96 or any Commission regulation unless and until it determines that three conditions have been satisfied. 47 U.S.C. § 160(a).

The Commission must make affirmative determinations that: (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications

carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; *and* (3) forbearance from applying the provision or regulation is consistent with the public interest. 47 U.S.C. § 160(a)(1)-(3).

In making the public interest determination under Section 10(a)(3), Section 10(b) of the Act requires the Commission to consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions and enhance competition among telecommunications providers. 47 U.S.C. § 160(b). If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a finding that forbearance is in the public interest. However, there is a limitation on the Commission's forbearance authority. The Commission "may not forbear from applying the requirements of Sections 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented." 47 U.S.C. § 160(d). Because the statutory requirements of Section 10(d) have not been fully implemented here, the FCC may not grant forbearance.

Assuming, *arguendo*, that USTelecom may pursue the requested relief through the forbearance process as opposed to the previously-discussed impairment process, USTelecom has not presented a *prima facie* case for forbearance. The Petition lacks sufficient empirical evidence and support to satisfy the statutory criteria to obtain forbearance from the FCC, particular for the unbundling and resale obligations. In short, USTelecom has not provided sufficiently granular data to meet its burden of proof that the unbundling and resale obligations are no longer necessary to for competing carriers and their end-user customers.

In its Petition, USTelecom offers only general arguments why forbearance should be granted to all member ILECs collectively. However, both the requirements of the

Section 10 and the Commission's sound forbearance practice in the *Triennial Review Order* and *TRRO* dictate that the Commission must carefully scrutinize the merits of the relevant facts and arguments with the appropriate geographic, and hence company-specific, focus. USTelecom provided no geographic, company-specific and disaggregated analysis to support the relief requested in its Petition on a national basis. USTelecom provides only general statistics that indicate broad market trends, not granular evidence from any of USTelecom's ILEC members. USTelecom avers only that there has been a precipitous decline in the number of ILEC switched voice lines due to the availability of competitive alternatives for voice service. Petition at 8-10. Purportedly, this rapid migration of customers from ILEC services to competitive facilities-based voice alternatives is evident in both the residential and business market segments. However, USTelecom provides no study or data applicable to any specific USTelecom member.

Of note, the Pa. PUC previously conducted a proceeding in response to a Verizon request to re-classify basic local service as competitive in 194 of their 504 wire centers in Pennsylvania. While the Commission subsequently reclassified 153 of the wire centers as competitive, that decision was made using a process that afforded parties the opportunity to present evidence, cross-examine witnesses, and submit briefs and was based on an evidentiary record of very granular data to support that decision. The Pa. PUC believes that a similar approach using a proceeding before an Administrative Law Judge is warranted here, given the national scope of the decision rendered by the FCC and the impact on local, regional, and national competition. The Pa. PUC does not support using a paper proceeding, consisting of comments and reply comments as well as the plethora of Ex Parte filings that often follow those filings, as the optimal route to a decision compared to a contested and supported on-the-record proceeding, given the scope of the issues at stake and the impact sure to arise from any decision.

Because the Petition lacks any granular analysis and supporting data on any company-specific basis, USTelecom has not demonstrated the emergence of sufficient

competition in any specific geographic or relevant product market on a disaggregated basis sufficient to satisfy the forbearance requirements.

C. The Pa. PUC is Concerned that the Elimination of Unbundling and Resale Obligations as Proposed by USTelecom Will Undermine the Ability of Affected Competitive Carriers to Provide Service to End-Users.

As previously stated, Section 251(c)(3) of TA-96 requires ILECs to maintain the availability of physical UNEs for use by other telecommunication carriers or CLECs. A carrier offering services solely by recombining UNEs can offer services that differ from those offered by an incumbent. Additionally, carriers using UNEs can bundle services that ILECs sell as distinct tariff offerings, as well as services that ILECs have the capability to offer, but do not, and can market them as a bundle with a single price. The ability to package and market services in ways that differ from the ILECs' existing service offerings increases the requesting carrier's ability to compete against the incumbent and benefits consumers. Carriers solely using UNEs can also offer exchange access services.

Currently, the Pa. PUC has a total of 167 competitive carriers with a Certificate of Public Convenience (CPC) to provide service in Pennsylvania. The Pa. PUC continues to issue CPCs to new competitive carriers, the majority of whom continue to rely on UNEs and resold services in order to provide service to their end-user customers. These carriers also continue to file with the Pa. PUC interconnection agreements entered into with the relevant ILECs. Any FCC decision that ends UNEs and resale effectively undermines the ability of these competitors to provide the competitive alternatives that exist today.

The clear purpose of TA-96, particularly the ILEC-specific unbundling requirements of Section 251(c)(3), is to prevent an ILEC from abusing its market power

over the local loop to prevent competition. Local exchange and exchange access services critically depend on maintenance and operation of the "local loop," which is the physical infrastructure through which wire-based telecommunications service is provided. ILECs continue to have monopoly power over the provision of local loops, and therefore, an ILEC should be not allowed to use its local loop monopoly power to leverage its position in the telecommunications services market. Because the local loop is a natural monopoly or, at best, a duopoly given the prevalence of cable networks, the unbundling obligation imposed on ILECs allows small providers to access homes and businesses and provide service. Thus, for at least some carriers, wholesale access remains a critical bridge that facilitates bringing competition to those markets that may be less naturally open to robust competition.

Resale involves buying services or facilities from facilities-based providers at a discount rate⁷ and reoffering communications services to the public for a profit. Carriers reselling ILEC services are limited to offering the same service an incumbent offers at retail. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service.

Essentially, USTelecom is asserting that ILEC-specific Section 251(c)(4) resale obligations should no longer apply to them because ILECs do not exercise market power over local exchange services. However, the Pa. PUC is concerned that the ILECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. The ability of ILECs to impose resale restrictions and conditions would allow ILECs to protect their market position by withdrawing services unilaterally and unconditionally. If the Petition is

⁷ The discount established in Pennsylvania varies depending on whether the competitor wants to provide their own Operator Supported Services (OSS) or seek to obtain those from the incumbent and rebrand them as their own. The discount is larger where the competitor provides their own OSS; smaller where they do not.

granted, ILECs could raise prices significantly if the resale obligation is eliminated. As one example, the Pa. PUC notes the USTelecom proposal to increase UNE rates by 15% on the effective date of the grant of forbearance. The Pa. PUC is concerned that carriers could experience the same or similar type of increase with resale as well. The Pa. PUC contends that exempting ILECs from the resale obligation is at odds with the pro-competitive goals of the TA-96 Act and Congressional intent to encourage competition in all telecommunications markets.

Given the lack of empirical evidence by market and by company, USTelecom's forbearance request related to resale obligations in Pennsylvania is not supported and should not be granted on a blanket basis. Resale under Section 251(c)(4) should remain available unless deemed unreasonable, not necessary to protect consumers, and inconsistent with the public interest. Thus, ILECs should continue to have the burden of justifying any restrictions they impose on the resale of their services.

Also, the Commission and the states both play an important role in promoting local competition and TA-96 spells out the terms of their partnership. The Pa. PUC asserts that USTelecom's request for forbearance from the Section 252 associated requirements that facilitate both unbundling and resale obligations, 47 U.S.C. § 252(a)-(c), (d)(1), (d)(3), (e), and (h), would undermine the states important role in setting prices for UNEs and the wholesale rates when mediating and arbitrating interconnection agreements disputes. The states have been authorized to develop mediation and arbitration rules that support the objectives of the TA-96 and may develop specific measures that address the concerns of small entities and small ILECs participating in mediation or arbitration. Granting forbearance from the TA-96 unbundling obligations would seem to put an end to this federal-state partnership.

In any event, if the FCC grants forbearance to USTelecom from ILEC-specific unbundling obligations under Sections 251(c)(3) and (4) of TA-96, the Pa. PUC notes

that any changes should be implemented pursuant to applicable change in law provisions in applicable interconnection agreements. USTelecom's suggestion that there should be a "transition period" for current interconnection agreements seems to ignore that these agreements typically have applicable change in law provisions that may be triggered by the granting of forbearance here. State commissions continue to have a vital and integral role in processing and approving interconnection agreements,⁸ and that role should continue with any disputes that may arise under applicable change in law provisions due to the granting of forbearance here.

Additionally, USTelecom suggests as part of the "transition period" that "new orders for service" (presumably for wholesale interconnection and UNEs) "shall be addressed via commercial negotiations or tariffed services where available." To the extent these negotiations are memorialized in private commercial agreements, the FCC should be mindful of and recognize that state commissions may have independent state authority to approve such agreements as well.⁹ Thus, states should retain their authority to review and approve any commercial agreements that replace Section 251 interconnection agreements, and the states also should be authorized to resolve any disputes that arise under these agreements.

III. Conclusion

The Pa. PUC opposes USTelecom's request for forbearance from Section 251(c) and related Section 252 requirements. Until the Commission has conducted an impairment analysis under Section 252(d)(1) of TA-96, or in the alternative, should the Commission decide to proceed under forbearance, until USTelecom provides sufficient

⁸ For example, the Pa. PUC has approved a total number of 67 Interconnection Agreements from January 1, 2016 to the present.

⁹ For example, the Pa. PUC has certain powers over contracts between public utilities under Section 508 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 508. Of note, both ILECs and certificated CLECs operate in Pennsylvania as "public utilities" and thus, are both potentially subject to the Pa. PUC's Section 508 jurisdiction.

granular support to warrant forbearance of Section 251(c)(3) and (4) obligations by specific company and territory, the FCC should not grant USTelecom's blanket request to allow relinquishment of unbundling or resale obligations currently imposed on ILECs.

The Pa. PUC appreciates this opportunity to file comments in this proceeding.

Respectfully submitted,

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